

The Case of the Married Spinster: An Alternative Explanation.

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Carol Z. Wiener, in an article entitled "Is a Spinster a Married Woman?" suggests that Elizabethan and Stuart justices of the peace in drawing up indictments against married women in the form "A.B. wife of C.D. spinster," or "A.B. & C.D. his wife, spinster" were apparently motivated by a desire to do their duties despite their uncertainty as to the criminal responsibility of married women and as to the apportionment of blame between husband and wife.¹ It will here be argued that there exists evidence to support a possible alternative explanation for this phenomenon based on the more prosaic procedural issue of marital status as a defence to criminal indictments.

Wiener propounded that the legal fiction of the married spinster was employed to enable the justices to "shuttle happily between [the] . . . practical world in which wrongdoers must be punished for their wrongs and an ideological world in which married women were uniformly subservient to their husbands and in which the law, as written in law books, actually worked." It thus enabled local justices of the peace to overcome the uncertainty inherent in those who lacked the expertise of a Lambarde or a Dalton² when faced with an unusual legal problem.

Such a diffidence may have existed in Elizabethan times, when relatively few justices of the peace had any legal training, but is less likely in the middle or late seventeenth century when, as Gleason has shown, "almost all the men who administered English local government had resided for a time . . . as a member of a legal college,"³ namely one of the Inns of Court in London. Moreover, many justices, like Henry Townshend of Worcester, would probably have possessed copies of works by Lambarde and Dalton, or of the *Compleat Justice* which, like Townshend, they would possibly have annotated with their own experiences in and out of quarter

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1. 20 *Amer. J. Leg. Hist.* 27 (1976).

2. 20 *Amer. J. Leg. Hist.* 29, 31 (1976).

3. Gleason, *Justices of the Peace in England, 1558-1640* (1969).

sessions.⁴ Indeed, Sir Peter Leicester, in his charges to various Cheshire grand juries during the reign of Charles II, shows a very clear understanding of the law in general, and had evidently a close working knowledge of the available authorities and justices' *vade-mecums* which would have enabled him to deal fairly confidently with problems raised by married women criminals.⁵ He was certainly an outstanding example, but he cannot have been the only country justice to make a thorough study of the law which he was duty bound to administer.

A more decisive factor than the conjectured legal expertise of justices of the peace at this period is the fact that similarly worded indictments are to be found in the assize records of the later Stuart period. They also occasionally appear in the Kings Bench indictments for London and Middlesex and in cases famous enough to find their way into the State Trials series.

For instance, in the records of the assize at Kingston-on-Thames in Surrey in 1660, several women are indicted in the form "A.B. spinster, also called A.B. wife of C.D.".⁶ This form was used whether the woman was indicted alone or together with her alleged husband.

Thus Martha Mason, spinster, also called Martha Mason wife of Hugo Mason, was indicted for stealing three linen sheets and a petticoat worth 50 shillings; and Mary Hull, spinster, also called Mary Hull wife of John Hull, was charged with the murder by suffocation of her female infant. This formula was also used in the case of Mary Warner, spinster, also called Mary Warner wife of John Warner, who was indicted with her husband and three other men for the theft of household linen and a petticoat to the value of 60 shillings.⁷

Similarly in 1663 at the Old Bailey, Mary Moders, spinster, also called Mary Stedman wife of Thomas Stedman, was indicted for bigamy,⁸ and Mary Turner, spinster, wife of James Turner, was charged with her husband and sons with the crime of burglary in a trial before the Lord Chief Justice himself.⁹

The series of Ancient Indictments (ending in 1675) and the Modern Indictments series which succeeded them also provide examples of indictments in this formula. These indictments in-

4. *The Compleat Justice* (1661) with manuscript notes by Henry Townshend J.P., Hereford and Worcester Diocesan Record Office.

5. Leicester, Sir Peter, *Charges to the Grand Jury at Quarter Sessions, 1660-1677* (1953), edited by Elizabeth M. Halcrow.

6. Public Record Office (P.R.O.) ASSI 35/101(2).

7. P.R.O. ASSI. 35/101(2).

8. 6 *St. Tr.* 274.

9. 6 *St. Tr.* 566.

clude not only original indictments in Kings Bench but also Quarter Sessions cases removed to the Kings Bench by certiorari or error.

Thus, in 1667, Mary Moncke wife of Richard Moncke, spinster, was presented by the grand jury for having been implicated with her husband and other men in her forcible rescue from the bailiff who had arrested her.¹⁰ The records for 1688 contain numerous indictments couched in the formula under consideration: Sarah, wife of Henry Grafton, spinster, indicted for illicitly acquiring goods worth 30 shillings under pretence of borrowing them; Sara Lawrence, wife of Robert Lawrence, spinster, charged together with Mary, wife of one Padgett, spinster, with theft of articles to the value of 8 pounds 10 shillings; Anne, wife of Henry Haynes, spinster, indicated for receiving 40 shillings' worth of stolen property; Martha, wife of William Hartnell, spinster, and Jane, wife of Robert Hartnell, spinster, presented by the grand jury for receiving goods to the value of 5 pounds; Margaret Browne, wife of one Browne, spinster, and the wife of Richard Poole (no Christian name), spinster, indicted for illicitly acquiring two gold rings by deception.¹¹

These indictments occur before assize judges who, as members of the central law courts or at the very least serjeants-at-law, would be presumably far more familiar with the law relating to crime and married women than ordinary country justices of the peace. It would seem unlikely, therefore, that the use by qualified lawyers of indictments framed in this manner was a result of a lack of expertise similar to that attributed to justices of the peace. Some other explanation for the form of indictment would seem to be required.

It is submitted that such a solution is to be found in Kelyng's Reports, which cover crown pleas during the Restoration period. Kelyng discusses the case of one Jane Jones, who, at the Old Bailey Sessions of 7th December 1664, refused to plead to the original indictment. This charged her, together with one Thomas Wharton, with the crime of burglary. The defendant claimed to be Wharton's wife, and wished the indictment to reflect this in order that she might claim the benefit of the presumption of marital coercion. As a compromise, the court ordered the indictment to be reframed "Jane Wharton, alias Jones, spinster," in order to induce her to answer the charge so that the trial might proceed. The court stipulated that the question of her having been Wharton's wife at the time of the burglary should be determined along with the general issue of guilt at the trial. In the event she failed to establish her marriage and was convicted.¹²

10. P.R.O. K.B.9 Bundle 909(4).

11. P.R.O. K.B.10 Bundle 5(1).

12. 84 *Eng. Rep.* 1071.

It would seem from this that an alternative explanation of the phenomenon of the married spinster can be proposed, namely that, where a woman raised a defence involving her marital status, and the existence of a valid marriage was unproved at the time of the indictment, the court would allow the use of an apparently contradictory form, naming the defendant both wife and spinster. This could either be express, as in the assize cases cited above, or implied, as in the indictment cited by Kelyng, where although the word "wife" was not used, the woman was called by her alleged husband's name. This would be intended to induce the accused to answer the charge instead of quibbling at the form of the indictment. This obviated the necessity of applying *peine forte et dure* or other less draconian (but still painful) persuasions such as tying the thumbs with whipcord as in the case of George Thorley, also cited by Kelyng.¹³ The court was then able to proceed with the trial of both the substantive criminal charge and the issue of the marriage which would provide the accused woman with a possible defence.

In most cases the defence claimed would be that of marital coercion. This was definitely the case in the trial of Mary Turner who was acquitted of being an accessory to her husband's burglary because she had acted throughout on his direction.¹⁴ However, in the case of Mary Hull and that of Mary Moders, both cited above, marital status was important for different reasons.

In Mary Hull's case the question of marital coercion was irrelevant since her crime was that of murder or manslaughter and the defence did not extend to this.¹⁵ Her marital status was still far from irrelevant to the outcome of her trial, possibly. If she were married, the prosecution would be for the common law crime of murder, and the burden of proving that she had killed the child rested with the Crown. The child died by suffocation, an equivocal fate, occurring naturally as well as by human intervention, and the prosecution might have had difficulty in establishing that the suffocation was deliberately inflicted. If she were unmarried, however, she might come within the ambit of the statute 21 Jac. 1, cap. 27, which provided that the mother of a bastard child which had died and whose birth had been concealed, was to be adjudged guilty of its murder unless she could produce a witness to prove that the child had been born dead. Thus Mary Hull's acquittal or conviction would possibly depend heavily on the burden of proof, which in itself would be determined by her marital status.

The situation was similar in Mary Moders' case. She was accused of bigamy in the most intriguing circumstances. Her marital

13. 84 Eng. Rep. 1066.

14. 6 St. Tr. 566.

15. Hale, 1 *Placita Coronae*, p.45.

status at the time of embarking on an alleged second matrimonial venture was of vital importance. To her it meant the difference between acquittal and death, for bigamy was an offence not covered by the limited equivalent to benefit of clergy which women were entitled to under the statute 21 Jac. 1, cap. 6.

It is interesting to note that nearly every indictment in the form "A.B. spinster, also called A.B. wife of C.D." concerned an offence for which a woman, if convicted, faced the death penalty unless the last ditch defense of marital coercion was open to her. The cases in the Ancient and Modern Indictments are nearly all theft or allied prosecutions where the amount involved was in excess of the 10 shilling maximum provided by the statute of James I.

From this it is tempting to conjecture that women were probably as aware of the possibilities of the defence of marital coercion as men were of their much wider right of benefit of clergy. They perhaps pleaded it habitually and automatically as a last straw, whether entitled or not, just as illiterates prayed benefit of clergy in the hope of being able to recite the "neck verse" with sufficient accuracy to convince the court. This hypothesis seems to be reinforced by the fact that other indictments at the same sessions which did not involve capital offences did not follow this formula, but merely referred to the accused as being "A.B. wife of C.D.". This suggests that the issue of marital status was in the circumstances regarded as irrelevant to the case, and had not been raised by the accused. Thus Jane Walker, who was accused of being a calumniator and disturber of her neighbors (a finable offence only) was simply referred to as Jane, wife of Andrew Walker. And when William Ward and his wife were charged with forestalling the market contrary to the Act 5 Eliz. cap. 12, the accused woman was not even named, being merely referred to as "his wife".¹⁶

There are indications in Kelyng's Reports that some of the central law court judges were inclined to deplore the automatic and indiscriminate granting of clergy. Thus at the Newgate Sessions for 14th October 1662, the court threatened to fine the ordinary who said "legit" when in fact the prisoner could not read and had recited the "neck verse" incorrectly. The prisoner himself was subsequently hanged when he admitted that he could not read.¹⁷ At an Old Bailey Gaol Delivery on 5th April 1665 the threat to fine an ordinary in such circumstances was actually carried out.¹⁸

In view of this attitude to benefit of clergy among the judges, it may be that the judiciary was suspicious too of claims of coercion

16. P.R.O. K.B.10 Bundle 5(1).

17. 84 Eng. Rep. 1067.

18. 84 Eng. Rep. 1078.

raised by married women and consequently required, in cases where marital status was not proved at the indictment stage of the proceedings, that the prisoner plead to a modified indictment which recorded the claim to the status of wife without admitting that the accused was in fact and law a married woman. The ultimate issue as to this would be put up for proof with the general question of guilt as the trial proceeded. If the judges could occasionally be sticklers about granting benefit of clergy, there is no reason why they should not also have stood by the letter of the law where a defence involving marital status was raised.